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No. 92-2006

In the Supreme Court of the United States

OCTOBER TERM, 1993

UKIAH ADVENTIST HOSPITAL, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly declined to issue a writ of mandamus requiring the district court to rescind an order transferring this action pursuant to 28 U.S.C. 1631.

2. Whether the district court's order was immediately appealable under 28 U.S.C. 1292(a)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a15) is reported at 981 F.2d 543. The opinion of the district court (Pet. App. c1-c2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1992. A petition for rehearing was denied on March 23, 1993. Pet. App. B. The petition for a writ of certiorari was filed on June 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Adventist Health System/West (AHS) is a non-profit corporation that controls 18 hospitals in 5 States. AHS's combined patient revenues exceeded $600 million in 1990. Petitioner Ukiah Adventist Hospital (Ukiah Adventist) is a subsidiary of AHS. Ukiah Adventist is now doing business as Ukiah Valley Medical Center. In August 1988, petitioners acquired substantially all the assets of Ukiah General Hospital. Pet. App. a3, *id.* at i3-i4.

In November 1989, the Federal Trade Commission issued an administrative complaint alleging that petitioners' acquisition violated Section 7 of the Clayton Act, 15 U.S.C. 18. Pet. App. a3; *id.* at i1. In 1990, the administrative law judge issued an order and initial decision concluding that an asset acquisition by a non-profit corporation is not covered by Section 7 and dismissing the administrative proceeding. Pet. App. d1-d9, *id.* at e1-e12.

In August 1991, the Commission issued an opinion and order reversing the ALJ's initial decision and remanding for further proceedings. Pet. App. f1-f41. The Commission concluded that Section 7 of the Clayton Act applies to asset acquisitions by non-profit entities, and remanded to the ALJ to consider whether the challenged transaction violated Section 7. Pet. App. f6, f41.

2. After the FTC issued its complaint, petitioners filed an action in the United States District Court for the Northern District of California seeking to terminate the administrative proceeding on the ground that asset acquisitions by non-profit entities are not covered by Section 7. The district court dismissed the action for lack of jurisdiction, Pet. App. g1-g5, and the court of appeals affirmed, *id.* at h1-h10. Relying on this Court's decision in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980),

the Ninth Circuit concluded that "[t]he general rule is that administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix some legal relationship.'" Pet. App. h5.

3. After the Commission issued its interlocutory order, petitioners filed this action in the United States District Court for the District of Columbia. Petitioners again sought to enjoin the administrative proceeding on the ground that their asset acquisition is not covered by Section 7 of the Clayton Act.

The district court granted the FTC's motion to transfer the case to the Ninth Circuit pursuant to 28 U.S.C. 1631.[1] The district court explained that review of the Commission's final decision is vested exclusively in the courts of appeals under 15 U.S.C. 21(c) and (d), and that any order issued by the district court would be likely to affect the Ninth Circuit's future jurisdiction.[2] Accordingly, the district court held that it lacked jurisdiction under *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 74-79 (D.C. Cir. 1984) (*TRAC*). The district court stated that "[b]ecause the Court finds that

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[1] Section 1631 provides, in part:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed[.]

[2] Under 15 U.S.C. 21(c), the Commission's cease and desist orders are subject to review "in the court of appeals * * * for any circuit within which [the] violation occurred or within which [the] person [subject to the order] resides or carries on business." Petitioners have not disputed that any cease and desist order that the Commission may enter in this case will be subject to review only in the Ninth Circuit.

it lacks jurisdiction, it does not reach the merits of plaintiffs' motion" for a preliminary injunction. Pet. App. c1.

4. The court of appeals affirmed. Pet. App. a1-a15. It first held that the district court's order transferring the case to the Ninth Circuit was not appealable. *Id.* at a4-a8. The court noted that "it is well settled" that transfer orders are not final orders and are not immediately appealable under the collateral order doctrine. *Id.* at a4-a5 (collecting authorities). The court adopted "the common sense view that section 1631 orders are interlocutory for the same reason that venue transfers are: the very purpose of transfer provisions is to allow the case to continue, rather than terminating it." *Id.* at a5-a6.

The court rejected three suggested bases for appellate review of the transfer order. First, the court concluded that the order was not reviewable under 28 U.S.C. 1291 because the district court did not dismiss the action for lack of subject matter jurisdiction. The court explained that "[a] transfer order keeps the case alive; an order dismissing the case brings the action to an end." Pet. App. a6. Second, the court of appeals concluded that its decision in *Goble* v. *Marsh*, 684 F.2d 12 (D.C. Cir. 1982), was inapplicable because, unlike in *Goble*, it is clear that the transferor court and the transferee court do not have concurrent jurisdiction to grant petitioners' request for injunctive relief. Pet. App. a6-a7. Third, the court of appeals rejected petitioners' contention that the district court's order denied a preliminary injunction, and therefore is appealable under 28 U.S.C. 1292(a)(1). The court of appeals found that the district court had transferred the action without reaching the merits of petitioners' motion for a preliminary injunction. And it noted that the transfer order is "wholly unrelated" to the merits of petitioners' claim for injunctive relief. Pet. App. a7-a8.

The court of appeals proceeded to consider petitioners' appeal as a petition for a writ of mandamus. Pet. App. a8-a15. The court held that the district court had "not even remotely approached committing the sort of abuse of its authority that would warrant granting a petition for mandamus." *Id.* at a10. The court of appeals concluded that the district court lacked subject matter jurisdiction. The court of appeals' decision in *TRAC* held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." *Ibid.*, quoting 750 F.2d at 75. In this case, the court of appeals explained, it is undisputed that review of FTC cease and desist orders is committed to the courts of appeals under 15 U.S.C. 21(c) and (d). In addition, the district court's disposition might affect the court of appeals' future jurisdiction. If the district court were to enjoin the FTC proceeding, the court of appeals' statutory obligation to review the FTC's order on the merits might be defeated. Pet. App. a11.

The court of appeals rejected petitioners' argument that district courts had jurisdiction to decide "purely legal" challenges to agency jurisdiction, stating that allowing such an exception "would invite an endless stream of suits filed in district courts, followed by appeals to this court, by parties seeking to stall or foreclose agency action." Pet. App. a13-a14. The court of appeals emphasized that denial of judicial review in the district court did not foreclose all judicial review, because petitioners are entitled to judicial review of any final cease and desist order that the Commission might issue. *Id.* at a12.

The court of appeals also concluded that the transfer was in the interest of justice, and that the action could have been brought in the Ninth Circuit at the time it was

filed in the wrong forum. Pet. App. a14-a15, citing *Clark* v. *Busey*, 959 F.2d 808, 811-812 (9th Cir. 1992); *Public Utility Commissioner* v. *BPA*, 767 F.2d 622, 626 (9th Cir. 1985).

5. While petitioners' appeal was pending before the District of Columbia Circuit, discovery and evidentiary proceedings were completed in the administrative proceeding. Pet. App. i2-i3. In December 1992, the ALJ issued an initial decision concluding that the transaction was unlikely to cause unlawful anticompetitive effects and therefore did not violate Section 7 of the Clayton Act. Pet. App. i53-i54. The FTC staff filed an appeal, and the Commission heard oral argument on April 22, 1993. It has not yet issued a final decision.[3]

ARGUMENT

1. The court of appeals' interlocutory decision does not warrant review. The Ninth Circuit now has physical possession of the record in this case, and petitioners are litigating the merits of their motion for a preliminary injunction in that court. In addition, the Ninth Circuit may review the transfer and, if it finds the transfer to have been "clear error," decline to accept it. *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817-819 (1988). If the Ninth Circuit rules against petitioners, petitioners may then seek review in this Court.

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[3] If the Commission finds a violation of law, it may enter an order to divest and for other appropriate relief. 15 U.S.C. 21(b). The Commission's order is subject to review in the court of appeals, 15 U.S.C. 21(c). After the record is filed, "[the] jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the Commission * * * shall be exclusive." 15 U.S.C. 21(d). The Commission's order does not take effect until judicial review is complete. 15 U.S.C. 21(g).

See *id.* at 817 ("[a] petition for writ of certiorari can expose the entire case to review").[4]

Moreover, the Ninth Circuit may well conclude that the Commission's order is not yet subject to review in *any* court. As the Ninth Circuit explained in rejecting petitioners' previous effort to short-circuit the administrative process, "[t]he general rule is that administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix some legal relationship.'" Pet. App. h5. See *FTC* v. *Standard Oil Co.*, 449 U.S. at 238-239. The FTC's interlocutory order does not meet those criteria, and therefore is not subject to immediate judicial review.

2. a. Even if this case were a suitable vehicle for considering the court of appeals' application of its *TRAC* decision, that issue would not warrant review by this Court. Petitioners mischaracterize *TRAC* as a sweeping ouster of the district court's jurisdiction to enjoin unauthorized agency actions in virtually all circumstances. In fact, the decade-old *TRAC* decision is much more limited. *TRAC* rests on the settled principle that the courts of appeals have jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to protect their prospective jurisdiction over agency proceedings not yet before them. *TRAC*, 750 F.2d at 75-76, citing *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603-604 (1966). In *TRAC*, the court of appeals concluded that the existence of this prospective appellate jurisdiction over intermediate agency actions precluded collateral attacks on those actions in courts with no statutory review function. *TRAC*, 750 F.2d at 77. The court emphasized, however, that the scope of exclusive appellate review is limited to

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[4] Petitioners are in no position to complain about the completion of the transfer to the Ninth Circuit, because they failed to seek a stay of the District of Columbia Circuit's mandate.

"suit[s] seeking relief that might affect the Circuit Court's future jurisdiction." *Id.* at 78. Thus, *TRAC* applies only to attempts to seek interlocutory judicial review of interim agency action (or inaction) in ongoing proceedings where the relief sought threatens to defeat the appellate court's statutory obligation to review the final agency action. *TRAC* is thus consistent with this Court's recognition that ancillary or preliminary issues generally should be reviewed in the same forum that is charged with review of the final order resolving the core issue in a proceeding. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 742-743 (1985); *Foti* v. *INS*, 375 U.S. 217, 227, 232 (1963).[5]

b. Petitioners do not dispute that the District of Columbia Circuit's *TRAC* decision has been followed by other courts of appeals. See *Clark* v. *Busey*, 959 F.2d 808, 811-812 (9th Cir. 1992) (following *TRAC*'s companion case, *Air Line Pilots Ass'n, International* v. *CAB*, 750 F.2d 81 (D.C. Cir. 1984)); *Environmental Defense Fund* v. *NRC*, 902 F.2d 785, 786-787 (10th Cir. 1990); *Bywater Neighborhood Ass'n* v. *Tricarico*, 879 F.2d 165, 169 (5th Cir. 1989); see also *Green* v. *Brantley*, 981 F.2d 514, 521 (11th Cir. 1993). Contrary to petitioners' contention (Pet. 12), there is no conflict between the decision in this case and the Second Circuit's pre-*TRAC* decision in *PepsiCo, Inc.* v. *FTC*, 472 F.2d 179 (1972), cert. denied, 414 U.S. 876 (1973). In *PepsiCo*, the FTC denied a motion to dismiss an administrative complaint for failure to join additional parties. The Second Circuit concluded that the order was not made reviewable by the FTC Act be-

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[5] Subsequent decisions applying *TRAC* illustrate the limited scope of that decision. See *Cutler* v. *Hayes*, 818 F.2d 879, 887 n.61 (D.C. Cir. 1987) (*TRAC* does not apply where no statute commits review of agency decision to the court of appeals); *In re Checkosky*, 142 F.R.D. 4 (D.D.C. 1992) (*TRAC* inapplicable to a petition to perpetuate testimony under Fed. R. Civ. P. 27).

cause it did not require PepsiCo "to cease and desist from anything." 472 F.2d at 185. The court proceeded to consider the possibility that the order was subject to review by a district court under the Administrative Procedure Act as a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. The court discussed several reasons why such an order might not be reviewable under Section 704. See 472 F.2d at 185-186. Rather than resolving this question, however, the court accepted "for the sake of argument" the principle that Section 704 applies "if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order." 472 F.2d at 187. The court then concluded that PepsiCo fell outside that "possibly over-generous principle." *Ibid.* The Second Circuit's decision in *PepsiCo* plainly did not resolve the jurisdictional issue that it posed. Moreover, the court did not consider the possibility that the court of appeals had jurisdiction under the All Writs Act (and that therefore PepsiCo had an adequate remedy in another court).

c. Petitioners' suggestion that the court of appeals' decision conflicts with decisions of this Court is similarly unpersuasive. There is no conflict between the court of appeals' decision and *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). *McNary* was a challenge to an alleged "pattern or practice" of constitutional violations by the Immigration and Naturalization Service in its administration of the Special Agricultural Workers program (SAW). In holding that the district court had federal question jurisdiction to hear the case, the Court emphasized that individual SAW determinations were not subject to any judicial review unless the INS initiated a deportation proceeding against an unsuccessful applicant. *Id.* at 486. In addition, the plaintiffs in *McNary* did not seek to supersede the agency as the

initial decisionmaker in any specific proceeding. *Id.* at 494-495. And the Court recognized that the record in an individual deportation proceeding would not be adequate to permit review of the plaintiffs' constitutional claims. *Id.* at 496-497. In this case, in contrast, petitioners have a statutory right to judicial review of the Commission's final decision. Petitioners nevertheless seek to short-circuit the agency proceeding by litigating an issue that is integral to determining whether the challenged transaction is lawful and that does not require development of extraneous facts.[6]

This case is also quite different from *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988). One of the petitioners in *K Mart* argued that the case was governed by a statutory provision that conferred on the Court of International Trade exclusive jurisdiction to decide "any civil action commenced to contest the denial of a protest." *Id.* at 190, quoting 28 U.S.C. 1581(a). The petitioner conceded that it had not brought a "protest," but argued that the Court of International Trade had jurisdiction "as a corollary to protest jurisdiction." 485 U.S. 190. The Court held that Section 1581 did not apply to an action that "involves no 'protest,' much less a denial of one." *Id.* at 190-191. In this case, in contrast to *K Mart*, petitioners seek review of an interim order in a proceeding that is plainly subject to the exclusive jurisdiction of the courts of appeals. Moreover, it is clear that the interim order will be subject to plenary review by the court of appeals if the Commission enters a cease and desist order. *K Mart* is therefore inapposite.

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[6] The *McNary* opinion also emphasized that the relevant statutory provision limited judicial review to whether the agency had abused its discretion, a standard that was not appropriate for reviewing the plaintiffs' constitutional claims. 498 U.S. at 493. In this case, the FTC's legal determination on the Clayton Act issue will be subject to de novo review.

Contrary to petitioners' contention (Pet. 11), the court of appeals' decision does not conflict with *Leedom* v. *Kyne*, 358 U.S. 184 (1958). The Court has recognized that the "*Kyne* exception [to statutory judicial review provisions] is a narrow one." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). *Kyne* applies only where the aggrieved plaintiff has no other means of obtaining judicial review. See *Federal Reserve Board* v. *MCorp*, 112 S. Ct. 459, 465-466 (1991). By definition, *TRAC* applies only where a statute authorizes review by a court of appeals. Consequently, the two doctrines are mutually exclusive. See Pet. App. a12.[7]

3. Petitioners also ask this Court to grant review to decide whether Section 7 of the Clayton Act covers asset acquisitions by non-profit entities. Pet. 23-26. Neither the court of appeals nor the district court decided that question. There is no reason for the Court to depart from its usual practice of declining to consider issues that have not yet been addressed by the courts below, particularly in the context of an administrative proceeding that is still pending before the agency. Indeed, the issue will become moot if the FTC affirms the ALJ's dismissal order. See *Standard Oil*, 449 U.S. at 244 n.11 ("possibility that [party's] challenge may be mooted in adjudication warrants the requirement that [party] pursue adjudication, not shortcut it"). In any event, the only courts of appeals that have addressed the issue have concluded that Section 7 covers asset acquisitions by not-for-profit corporations. *FTC* v. *University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *United States* v. *Rockford*

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[7] The court of appeals' *TRAC* decision expressly recognized that *Kyne* might apply to "cases in which the underlying claim is not subject to the jurisdiction of the Court of Appeals." 750 F.2d at 78.

Memorial Corp., 898 F.2d 1278, 1280-1281 (7th Cir.) (dicta), cert. denied, 498 U.S. 920 (1990).

4. Finally, petitioners incorrectly contend (Pet. 26-27) that the district court's order denied their motion for a preliminary injunction, and therefore was immediately appealable under 28 U.S.C. 1292(a)(1). The district court clearly stated that it was not deciding the motion for a preliminary injunction:

> Before the Court are plaintiffs' motion for a preliminary injunction and defendant's motion to transfer the case or, in the alternative, to dismiss. Because the Court finds that it lacks jurisdiction, it does not reach the merits of plaintiffs' motion.

Pet. App. c1. As the court of appeals observed, the district court's order "reflects nothing more than the identification of the proper court, under *TRAC*, to decide the claim for injunctive relief." Pet. App. a8.[8] Moreover, the district court's refusal to reach the merits of petitioners' motion was plainly correct. Section 1631 "confers on [the court] authority to make a single decision upon concluding that it lacks jurisdiction—whether to dismiss the case or, 'in the interest of justice,' to transfer it to a court of appeals that has jurisdiction." *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. at 818. Accordingly, further review is not warranted.

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[8] Petitioners' suggestion (Pet. 27 n.21) that the transfer order had the practical effect of denying an injunction is incorrect. As the court of appeals noted, the purpose of a transfer order is to keep the case alive. Pet. App. a5-a6. Following the transfer order, petitioners were free to seek immediate relief from the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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